

WISCONSIN SUPREME COURT CALENDAR

January 31, 2001

10:45 a.m.

98-3577 Heritage Mutual Insurance Co. et al. v. William E. Larsen et al.

This is a review of a decision from the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a ruling of the Milwaukee County Circuit Court, Judge Michael G. Malmstadt presiding. The circuit court ruling confirmed a holding of the Labor and Industry Review Commission.

In this case, the Wisconsin Supreme Court will decide whether a traveling employee who was severely frostbitten after he fell asleep outside in temperatures that reached 25-below should have received worker's compensation. In making its decision, the Court will interpret the following state statute:

Wisconsin Statutes Section 102.58

Decreased compensation. If injury is caused by the failure of the employee to use safety devices which are provided in accordance with any statute or lawful order of the department and are adequately maintained, and the use of which is reasonably enforced by the employer, or if injury results from the employee's failure to obey any reasonable rule adopted and reasonably enforced by the employer for the safety of the employee and of which the employee has notice, or if injury results from the intoxication of the employee by alcohol beverages, as defined s. 125.02 (1), or use of a controlled substance, as defined in s. 961.01 (4), or a controlled substance analog, as defined in s. 961.01 (4m), the compensation and death benefit provided in this chapter shall be reduced 15% but the total reduction may not exceed \$15,000.

Here is the background: William Larsen and his wife are co-owners of Larsen Labs, a small Oak Creek company that performs spectrographic analyses and physical testing of metals. As part of his sales responsibility, Larsen occasionally had to travel. The couple also kept a mobile home on a 40-acre piece of land in Tigerton, near Shawano. They used this home as a company office and for recreation.

On Jan. 3, 1996, at 12:30 p.m., Larsen left the office in Oak Creek to drive to Tigerton. He told his wife that he planned to stay overnight in Tigerton and make a sales call on a former customer, Aarow Electric, the following day. He took company paperwork with him. It took Larsen approximately three hours to drive to Tigerton. Upon arriving, he stopped at a local grocery store and purchased food, liquor, and feed corn for the animals on the property. He then went to a nearby tavern where he consumed, as was his daily routine, four or five whiskey-and-Diet-Cokes. Along with the alcohol, Larsen took a couple of diet pills.

After about two hours in the tavern, he embarked on the three-mile drive to his mobile home. There, he found about five inches of snot on the front walk and steps – enough to prevent him from opening the front door. After shoveling, Larsen attempted to open the door with a key that had been recently made, but he could not get the key to work. He began to feel dizzy and, concerned that he might fall down, began trying to force the door open by hitting it with the shovel. Finally, he broke a window and reached

inside to unlock the door. The last thing Larsen remembers was being half in and half out of the entrance. He woke the following morning at 8:45 and found himself on the floor just inside the door, which was open. All of his fingers and most of both thumbs had to be amputated due to frostbite.

Larsen then filed a worker's compensation claim. An administrative law judge determined that, although Larsen was on a business trip at the time of his injuries, he had placed himself in a dangerous situation that was not created because of his employment. He was denied benefits. Larsen appealed to the Labor and Industry Review Commission (LIRC) and the LIRC reversed the finding. However, the LIRC reduced the benefits Larsen could receive by 15 percent because it found that his intoxication was a substantial factor in causing his injury.

Heritage Mutual Insurance Company appealed to the circuit court, which not only affirmed the decision awarding Larsen benefits, but also reversed the 15 percent penalty. The circuit court found that, while the LIRC's inference that Larsen was intoxicated was appropriate because it was based on credible evidence, the conclusion that the intoxication caused the frostbite was not based upon any evidence in the record and therefore was improper.

Heritage Mutual then appealed to the Court of Appeals, which affirmed the circuit court's determination.

The Supreme Court will decide whether Larsen was properly compensated under the "traveling employee" provisions of the Worker's Compensation Act.